SUPREME COURT, U.S.
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No. 97-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH BRILLINGER, CHRISTINE GRUDZIEN, FREDERICK A. HOLMES, FRED M. SLOAN, LAUREEN WARRICK,
For themselves and all others similarly situated,
Petitioners,

v.

GENERAL ELECTRIC COMPANY, RCA CORPORATION, RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATION AND SUBSIDIARY COMPANIES, GE PENSION PLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether, upon a merger of two overfunded contributory defined benefit pension plans—as distinguished from a termination of a defined benefit pension plan—Section 208 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1058, requires an allocation, to or for the benefit of participants, of surplus assets attributable to employee contributions, that exist at the moment of the plan merger?

SUPREME COURT RULE 29.6 STATEMENT

Respondent General Electric Company ("GE") certifies that it has no parent company. At one time, Respondent RCA Corporation was a subsidiary of Respondent General Electric Company. RCA Corporation no longer exists (except as a matter of trademark and intellectual property law).

General Electric Company itself has common stock and debt securities which are publicly traded. General Electric Company also has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held.

Those with publicly-held equity securities are:

—CAMCO, Inc. (Canada)
—General Electric Capital Corporation
(formerly General Electric Credit Corporation)
—Montgomery Ward & Co., Incorporated

Those which have only publicly-held debt securities are:

—Credit DeL'Est
—Finax FS AB
—Finax KK AB
—GE Capital Aviation Services, Ltd.
—GE Capital Mortgage Services, Inc.
—GE Capital (NZ) Ltd. (New Zealand company)
—GE Capital PTY Ltd. (Australia company)
—GECC Financial Corporation (Hawaii)
—GNA Corporation
—Gate Finance Corporation
—General Electric Capital Canada, Inc.
—General Electric Capital Services, Inc.
(formerly General Electric Financial Services, Inc.)
—General Electric Credit International, N.V.

—Imaging Financial Services, Inc.
(formerly Eastman Kodak Credit Corp.)
—International GE Capital Corporation
—Mercur Bank (Austria)
—Outlet Broadcasting, Inc.
—Service Bank GmbH

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Petitioners challenge their failure to receive an additional allocation of pension assets solely as a result of the merger of the GE Pension Plan ("the GE Plan") with the Retirement Plan for the Employees of RCA Corporation and Subsidiary Companies ("the RCA Plan").[1] Specifically, Petitioners claim that Section 208 of the Employee

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[1] RCA became a wholly owned subsidiary of GE in 1986. (*Brillinger* Compl. ¶ 22).

Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1058, required GE to allocate to them or for their benefit a portion of the surplus assets existing in the RCA Plan at the moment of the merger. The only *material* facts alleged by Petitioners' Complaints that relate to this singular legal issue are straightforward and few:

- Prior to the merger, the RCA Plan and the GE Plan were defined benefit pension plans that contained employee contributions.
- Petitioners participated in the RCA Plan.
- Petitioners made employee contributions to the RCA Plan.
- The RCA Plan and the GE Plan merged, effective January 1, 1989.
- At the time of merger, the RCA Plan had assets that exceeded the present value of its liabilities by over $1 billion.[2]
- When the RCA Plan merged into the GE Plan, participants in each plan were entitled to pension benefits under the terms of the merged plan immediately after the merger that were at least equal to the benefits to which they were entitled under the terms of their respective predecessor plans immediately before the merger. Transitory surplus plan assets that existed under both plans immediately before the merger remained in trust for the exclusive benefit of participants but were not immediately distributed or allocated to increase the benefits of participants of either plan.[3]

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[2] As the Third Circuit noted in its opinion in *Malia v. General Electric Co.*, 23 F.3d 828, 830 (CA3), *cert. denied*, 513 U.S. 956 (1994), the GE Plan had assets that exceeded the present value of its liabilities by nearly $7.5 billion at the time of the merger.

[3] In their Petition, Petitioners cite as "facts" certain matters that are both incorrect and not found anywhere in the record pleadings below, including:

The Petitioners have failed to plead or otherwise to allege—even by way of argument—one *crucial* fact. Petitioners have never even suggested or implied in any way that the RCA Plan actually terminated. As explained in detail below, the absence even of an allegation that the RCA Plan terminated dispositively distinguishes the instant case—as a matter of fact and law—from *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288 (CA9 1997), *cert. granted*, 118 S. Ct. 1558 (Apr. 27, 1998), and conclusively refutes Petitioners' assertion that the Second Circuit's decision below conflicts with the Ninth Circuit's decision in *Jacobson*.

REASONS FOR DENYING THE WRIT

I. NO CONFLICT BETWEEN THE CIRCUITS EXISTS AND PETITIONERS' ATTEMPT TO SUGGEST OTHERWISE IS WHOLLY CONTRIVED.

It is clear from both the complaint and the respondents' brief in opposition to the petition for writ of certiorari in *Jacobson*, as discussed below, that the plaintiffs' claim to surplus pension assets in that case depends entirely on an allegation that the Hughes Aircraft pension plan terminated or on an argument that such a termination should be ordered by a court. Petitioners in *Brillinger*, by contrast, claim a share of "surplus" pension assets based solely on a merger of two ongoing plans. Accordingly, this case involves nothing more than a straightforward issue of stat-

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- Petitioners' statement that GE sold the assets of RCA's Consumer Electronics Division to Thomson Electronics and terminated the employment of the bulk of RCA employees. (Pet. at 8).
- Petitioners' suggestion that the RCA Plan was funded solely by employee contributions. (*Id.*). To the contrary, the very nature of a defined benefit pension plan imposes a statutory liability on the sponsoring employer to ensure that the plan has assets sufficient to fund promised benefits and to contribute whatever amounts may be necessary. *See* 29 U.S.C. § 1082(c)(11).

utory construction—whether ERISA Section 208, 29 U.S.C. § 1058, requires an allocation, to or for the benefit of plan participants, of that portion of surplus assets that may exist in a transitory sense at the moment of a pension plan merger, and that derives from investment gains attributable to the participants' contributions to either of the plans involved in the merger.

Section 208 provides, in relevant part, that:

> [a] pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a *benefit* immediately after the merger, consolidation, or transfer which is equal to or greater than the *benefit* he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. § 1058 (emphasis added). Petitioners base their claim on the language in Section 208 that compares benefits before and after a merger, in each case as "if the plan had then terminated." They argue that this reference to a *hypothetical* plan termination mandates the same allocation of *assets* (as distinguished from benefits) in a plan merger as that required under ERISA Section 4044(d)(3), 29 U.S.C. § 1344(d)(3),[4] when an employer *actually* terminates a pension plan under Title IV of ERISA.

Two circuit courts (including the Second Circuit below) have considered this argument in the context of the 1989

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[4] Section 4044(d)(3) provides that in the event of a plan *termination*:

> (A) . . . if any *assets* of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section [which establishes priority categories of accrued *benefits* when a plan is terminated], such remaining *assets* shall be equitably distributed to the participants who made such contributions or their beneficiaries . . .

29 U.S.C. § 1344(d)(3)(A) (emphasis added).

merger of the RCA Plan and the GE Plan. Four federal district courts (two in unrelated cases) also have considered the contention. All have uniformly and categorically rejected Petitioners' argument. See Malia v. General Elec. Co., 91-CV-1743, 1992 WL 672267 (M.D. Pa. Aug. 10, 1992); *Malia v. General Elec. Co.*, 23 F.3d 828 (CA3), *cert. denied*, 513 U.S. 956 (1994); *Brillinger v. General Elec. Co.*, No. 3: 95-CV-02758 (PCD); *Brillinger v. General Elec. Co.*, 130 F.3d 61 (CA2 1997); *Flanigan v. General Elec. Corp.*, No. 3: 93-CV-516 (JBA) (D. Conn. Sept. 26, 1996); *Systems Council EM-3, Int'l Bhd. of Elec. Workers v. AT&T Corp.*, 972 F. Supp. 21 (D.D.C. 1997). *No federal district or appellate court has held to the contrary.* Accordingly, there is no compelling reason for the Court to expend its valuable but very limited resources to address the Petitioners' claim for a windfall.

To put this matter in perspective, this is the second time that representatives for the putative class in this case have asked the Court for an allocation of surplus assets as a result of the GE-RCA pension plan merger. In an earlier action, *Malia v. General Electric Co.*, 91-CV-1743, 1992 WL 672267 (M.D. Pa. Aug. 10, 1992), the United States District Court for the Middle District of Pennsylvania dismissed for failure to state a claim upon which relief could be granted, a claim *identical* to the claim raised by Petitioners here, brought by the *same* attorneys, and based on the *same* transaction, facts and legal theories as those on which Petitioners here rely.[5] In a thorough and well-

[5] *See Warrick v. General Elec. Co.*, 70 F.3d 736, 737-38 (CA2 1995) (in granting a writ of mandamus reversing the district court's transfer of this case pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Middle District of Pennsylvania, the Second Circuit acknowledged *Malia* and noted: "[T]he Middle District of Pennsylvania had previously dismissed an action *by individuals seeking essentially identical relief* as a result of GE's merger of the RCA Plan into the GE Plan, and the Third Circuit had affirmed the Middle District's dismissal for failure of the Complaint to state a claim.") (emphasis added).

reasoned opinion, the United States Court of Appeals for the Third Circuit affirmed that decision. 23 F.3d 828 (CA3 1994). After the Third Circuit had rejected the *Malia* plaintiffs' petition for rehearing and suggestion for rehearing *en banc*, the Court denied *certiorari* on October 17, 1994. *See* 513 U.S. 956 (1994).

On December 30, 1994, shortly after the Court refused to review the Third Circuit's decision in *Malia*, Petitioners, represented by the same attorneys as those who represented the plaintiffs in *Malia*—and in a classic example of forum shopping—filed this virtually identical action on behalf of the same putative class as in *Malia*.[6] The only differences between this case and *Malia* are the venue, the identity of the class representatives and the omission in this case of certain breach of fiduciary duty claims that the putative class advanced in *Malia*.

Before the Second Circuit's decision below, *Malia* was the leading—and the only—appellate decision addressing whether ERISA Section 208 required an allocation of pension surplus. The Third Circuit recognized the conceptual distinction between the "benefits" protected by Section 208 (which deals with pension plan mergers, consolidations and transfers) and the "residual assets" allocated under Section 4044(d)(3), 29 U.S.C. § 1344(d)(3) (which deals strictly with pension plan terminations). 23 F.3d at 831. The court in *Malia* analyzed the Section 4044 provisions that apply to actual plan termination, as follows:

> [Section 4044(a)] sets out the priority of allocation of assets of the plan on termination, giving first priority to accrued *benefits* derived from a participant's contributions to the plan which were not mandatory contributions; second priority to accrued *benefits* derived from mandatory contributions; third priority to *benefits* payable as an annuity; and fourth priority to

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[6] The district court dismissed *Malia* without addressing certification of the putative class, thereby allowing that same class to seek a different result in the Second Circuit.

> other and additional *benefits*. Subsections [4044(b)] and (c) provide for adjustment of allocations and increase or decrease in value of assets during the termination process. Subsection [4044(d)] then regulates the distribution of residual *assets* to the employer after the satisfaction of all liabilities to plan participants and their . . . beneficiaries. As described in [§ 4044(a)], those "liabilities" are the designated *benefits* payable to the participants. Section [4044(d)(3)(A)] then provides that, before any residual *assets* are distributed to the employer, "any *assets* of the plan attributable to employee contributions . . . shall be equitably distributed to the participants who made such contributions. . . ."
>
> *This language of [§ 4044] demonstrates clearly that "benefits" are elements that are conceptualized and treated differently in a plan termination than are the "assets" of that plan. "Benefits"* are computed in a different manner than *"assets."* Accrued *benefits are* placed on the liability side, rather than on the *asset* side of the balance sheet. "Residual *assets*" are computed only after liability for accrued *benefits* has been satisfied; "residual *assets*" are payable to the employer only after *assets* attributable to employee contributions have been returned to the employees.

23 F.3d at 831-32 (emphasis added).

The Third Circuit then turned for corroboration to the Treasury regulations under Section 414(*l*) of the Internal Revenue Code, 26 U.S.C. § 414(*l*), interpreting Section 208's requirements for plan mergers.[7] The court found the following provisions instructive:

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[7] Section 414(*l*) of the Internal Revenue Code, 26 U.S.C. § 414(*l*), is the corresponding Code provision that mirrors the plan merger rules set forth in Section 208 of ERISA. Thus, "all regulations implementing these provisions of [Sections 208 and 414(*l*)] have been promulgated by the Secretary of the Treasury, mostly under Section 414(*l*) of the Internal Revenue Code." *Van Orman v. American Ins. Co.*, 608 F. Supp. 13, 25 n.3 (D.N.J. 1984) (citing Section 101(a) of ERISA Reorganization Plan, Executive Order

> If the sum of the assets of all plans is not less than the sum of the present values of the *accrued benefit* (whether or not vested) of all plans, the requirements of section 414(*l*) will be satisfied merely by combining the assets and preserving each participant's *accrued benefits*. This is so because all the *accrued benefits* of the plan as merged are provided on a termination basis by the plan as merged.

23 F.3d at 832 (citing 26 C.F.R. § 1.414(1)-1(e)(1) (1994) (emphasis added). Finally, the Third Circuit noted that other federal courts have interpreted these regulations as limiting " 'benefits' under [§ 208] . . . to 'accrued benefits.' " *Id.* at 832 (citing *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1185 (S.D. Tex. 1991), *aff'd*, 36 F.3d 1308 (CA5 1994), *cert. denied*, 514 U.S. 1066 (1995), and *Van Orman v. American Ins. Co.*, 608 F. Supp. 13, 25 (D.N.J. 1984)). The court concluded "that §§ [208] and [4044(d)(3)] cannot be combined to provide plan participants with a right to residual assets in the context of a plan merger." *Id.* at 833.

The Second Circuit here undertook its own statutory analysis and reached the same result as the Third Circuit in *Malia*. *See* App. at 7a ("The issue we have dealt with here was addressed by the Third Circuit in *Malia v. General Electric Co.*, 23 F.3d 828 (3d Cir. 1994). Our conclusion is the same although our discussion is somewhat different.").[8]

12108, Dec. 28, 1978 (44 Fed. Reg. 1065)), *on remand from* 680 F.2d 301 (CA3 1982); *see also Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 509-11 (CA2 1994); *Malia*, 23 F.3d at 832 n.4.

[8] Petitioners argue that the Second Circuit's distinction between assets and benefits "contradicts the title and direction of 29 U.S.C. § 1344(a)," requiring an allocation of assets to provide for specified categories of benefits. (Pet. at 17). Presumably, Petitioners do not believe that distinction contradicts the actual *text* of Section 4044(a)—and indeed, it does not. Section 4044(a) requires an allocation of available assets to the extent necessary to fund specified benefits; it does not thereby convert those assets themselves into "benefits."

Respondents note that, apart from the Second Circuit's decision below, the United States District Court for the District of Columbia has followed the *Malia* analysis in an unrelated case. In *Systems Council EM-3, supra,* 972 F. Supp. 21, the plaintiffs challenged a pension plan formula for allocating residual pension plan assets upon a "spin-off" (*i.e.,* transfer) of plan assets and liabilities from one ongoing defined benefit pension plan to another such plan. The plaintiffs, who were represented by the same counsel who represents Petitioners here, relied on the same interpretation of Sections 208 and 4044 that Petitioners advance in this case in their effort to obtain pension surplus *without* a plan termination. *Id.* at 33-34. The district court rejected the plaintiffs' argument as follows:

> The reasoning of *Malia* is both *instructive* and *persuasive*. In that case, two pension plans were being merged and the beneficiaries of one of the original plans sought to have their benefits under the new, merged plans increased by a share of the residual assets that existed in their original plan at the time of the merger. The *Malia* court rejected the claim that ERISA sections 208 and 4044 should be read to give the beneficiaries a claim to the residual assets of the plan. In reaching its conclusion, the court discussed the distinction in ERISA's language between "benefits" and "assets", stating "[t]his language . . . demonstrates clearly that 'benefits' are elements that are conceptualized and treated differently in a plan termination than are 'assets' of that plan." *Malia,* 23 F.3d at 831-32. *This distinction is sufficiently persuasive and supported by the language of both ERISA and its implementing regulations to defeat Plaintiffs' claim.*

972 F. Supp. at 34 (emphasis added).[9]

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[9] *See also Flanigan v. General Elec. Corp.,* 3:93-CV-516 (JBA) (D. Conn.) (Sept. 26, 1996 Bench Ruling, at 151-53) (per Arterton, J.) (in this case, decided prior to the Second Circuit's decision in

In all, the following courts have considered and rejected the statutory construction of ERISA Section 208, 29 U.S.C. § 1058, that Petitioners advance here: Judge Kosik of the United States District Court for the Middle District of Pennsylvania; Chief Judge Dorsey and Judge Arterton, both of the United States District Court for the District of Connecticut; Judge Kessler of the United States District Court for the District of Columbia; a unanimous panel of the United States Court of Appeals for the Second Circuit; and a unanimous panel of the United States Court of Appeals for the Third Circuit.[10] As discussed immediately below, the only case that Petitioners cite in their effort to contrive a conflict, *Jacobson v. Hughes Aircraft Co., supra,* does not involve the statutory issue resolved in *Malia* and this case.[11] There is no federal appellate (or

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Brillinger, the district court, relying, *inter alia,* on *Malia,* dismissed a claim for an allocation of plan surplus in connection with a spin-off of assets, holding: "[T]he Court is convinced by [the] reasoning of *Malia* . . ."). A copy of Judge Arterton's September 26, 1996 Bench Ruling is attached to General Electric's Brief for Appellees, which is part of the Second Circuit record in this case.

[10] In addition, the Third Circuit in *Malia* and the Second Circuit in this case both refused requests for rehearing *en banc,* and the Court previously denied *certiorari* in *Malia.*

[11] Respondents note Petitioners' citation to *Hickerson v. Velsicol Chemical Corp.,* 778 F.2d 365 (CA7 1985), *cert. denied,* 479 U.S. 815 (1986). Petitioners' reliance on *Hickerson* is puzzling. First, that decision relates to a conversion by amendment of a defined contribution plan into a defined benefit pension plan. *Id.* at 367. This issue has no bearing on the issue presented in this case. Second, the Seventh Circuit in *Hickerson* did *not* hold—or even imply—that ERISA Section 208 should be interpreted as Petitioners urge. Indeed, the *Hickerson* court did not even purport to interpret Section 208. Third, if anything, *Hickerson* actually is consistent with the decision of the Second Circuit in this case. The Seventh Circuit noted: "But we do not think that ERISA and the accompanying regulations support plaintiffs' argument because ERISA's fiduciary principles protect employees' claims to accrued *benefits, not* their ownership of pension fund *assets.*" *Id.* at 374 (emphasis added).

trial) court decision contrary to the Second Circuit's decision in this case, and there is no conflict among the circuits.

II. *JACOBSON v. HUGHES AIRCRAFT* DOES NOT CONFLICT WITH THE DECISION OF THE SECOND CIRCUIT IN THIS CASE, AND THE COURT'S DISPOSITION OF THAT CASE WILL HAVE NO BEARING ON THIS CASE.

In their effort to create a split in authority regarding the interpretation of ERISA Section 208, Petitioners rely almost exclusively on *Jacobson v. Hughes Aircraft Co.*, a case pending review by the Court. Petitioners' argument that such a conflict exists is contrived at best.

In *Jacobson* the employer allegedly used pension assets attributable to employee contributions to fund additional pension benefits, including certain early retirement benefits. The plaintiffs alleged that Hughes Aircraft had violated ERISA by "improperly using plan assets attributable in part to employee contributions for its own benefit." 105 F.3d at 1291. Specifically, the plaintiffs pleaded in their complaint that Hughes Aircraft violated the following six provisions of ERISA: (1) Section 403(c)(1)'s anti-inurement provision, 29 U.S.C. § 1103(c)(1), which provides that plan assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants of the plan"; (2) Section 404, 29 U.S.C. § 1104, which generally requires an ERISA plan fiduciary to administer a plan solely in the interest of plan participants and beneficiaries; (3) Section 203(a), 29 U.S.C. § 1053(a), which prohibits forfeiture of vested benefits; (4) Section 4044, 29 U.S.C. § 1344, which requires an allocation of plan assets upon a plan termination (as distinguished from a plan merger or spin-off); (5) Section 406(a)(1)(D), 29 U.S.C. § 1106 (a)(1)(D), which prohibits the "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan"; and (6) Section 404(a)(1)(D), 29 U.S.C.

§ 1104(a)(1)(D), which specifically requires that a plan fiduciary must carry out its duties "in accordance with the documents and instruments governing the plan." 105 F.3d at 1292, 1296, 1298, 1300, 1301, 1302.

Notwithstanding these myriad claims, one claim is conspicuously absent. The plaintiffs in *Jacobson* did not suggest any violation of ERISA Section 208, 29 U.S.C. § 1058, which is the *only* claim presented by Petitioners' Complaints in this case.[12]

In fact, the *singular* similarity between *Jacobson* and this case is a claim for a share of surplus pension assets attributable to participant contributions. The plaintiffs in *Jacobson,* however, base that claim entirely on an allegation that the Hughes Aircraft pension plan "terminated . . . within the meaning of ERISA § 4044, 29 U.S.C. § 1344 . . ." (Pet. for Writ of Certiorari in *Jacobson* at App. at 141a). The *Jacobson* plaintiffs clearly recognized—and have acknowledged repeatedly—that there can be no allocation of surplus, nor can surplus even exist, without a plan termination under Title IV of ERISA. (*See* Respondents' Br. in Opp'n in *Jacobson,* at 1, 5, 6-7).[13]

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[12] Indeed, Petitioners in this case have noted that the district court in *Jacobson* denied the plaintiffs in that case leave to amend their complaint and, thus, "foreclosed consideration of claims that the *Hughes* transaction should be treated as a transfer or merger under 29 U.S.C. § 1058." (Pet. at 13). In fact, that issue is not before the Court in *Jacobson.*

[13] In response to these acknowledgments by the *Jacobson* plaintiffs, Hughes Aircraft observed in its reply brief in support of its petition for writ of certiorari to the Court: "[R]espondents [*i.e.,* the plaintiffs in *Jacobson*] have now made it clear that the termination issue is central to all of the other claims they have raised in this case. Their various allegations regarding violations of ERISA's fiduciary duties and structural provisions are inherently intertwined with their arguments about the supposed termination of the Plan. . . ." (*See* Petitioners' Reply to Br. in Opp'n in *Jacobson,* at 8).

For precisely this reason, Petitioners' suggestion that *Jacobson* could somehow be resolved under ERISA Section 208 (Pet. at 13-15) is utterly without merit. The parties in *Jacobson* are in full agree-

By contrast, Petitioners have never pleaded, argued or even suggested that the RCA Plan was somehow terminated. They have instead forthrightly and relentlessly maintained, both in *Malia* and here, that they are entitled to a share of surplus pension assets *without* a plan termination. This fundamental distinction between Petitioners' claims and those of the *Jacobson* plaintiffs establishes conclusively the absence of any conflict between the Ninth Circuit's decision in *Jacobson* and the Second Circuit's decision below.[14]

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ment that the participants would be entitled to an allocation of surplus pension assets *only* if there were an actual plan termination under Title IV of ERISA—not merely a plan amendment, merger, or transfer of assets and liabilities.

[14] It is not difficult to understand, in practical terms, why ERISA requires an allocation of surplus pension assets *only* when a defined benefit pension plan is *actually* terminated. In that event the plan's liabilities become fixed, and the value of the assets available to meet those fixed liabilities becomes determinable at the time for disposition of those assets. The plan's affairs are wound up, and any assets that are not needed to pay the benefits promised under the plan can be distributed or otherwise used as prescribed by Section 4044(d) of ERISA.

When a merger or spinoff of defined benefit pension plans occurs, on the other hand, the resultant plan or plans are ongoing. There can be no final accounting. As the United States Court of Appeals for the Seventh Circuit explained:

> Pension law covers bad times as well as good times. In bad times (when declines in the value of assets make plans underfunded) employers must contribute more. If in good times employers were required to distribute the surplus to retirees on the theory that they "owned" that value, outcomes would be asymmetric. Employers would be liable for shortfalls but could reap no benefit from surpluses. Rational employers would respond to that structure by reducing the levels of benefits promised in plans (or by creating fewer plans). Neither effect would serve employees' long run interests; neither would be consistent with the purposes underlying ERISA.

Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1190 (CA7 1994). Thus, Section 208 does not require an allocation of any surplus that might exist at the time of a merger or spinoff.

Moreover, due to these differences between the two cases, this Court's disposition of *Jacobson* would in no event require reconsideration of *Brillinger*. If the Court supports Hughes Aircraft, reverses the Ninth Circuit and remands *Jacobson*, that result and its underlying rationale undeniably would support the Second Circuit's decision here. If the Court holds for the plaintiffs and affirms the Ninth Circuit, on the other hand, that decision would not reach Petitioners' claims under ERISA Section 208, since Section 208 is not at issue in *Jacobson*. Rather, an affirmance presumably would be based on a conclusion that a plan termination either had occurred or should be ordered by a court. (*See* Pet. for Writ of Certiorari in *Jacobson*, at App. 141a; Respondents' Br. in Opp'n in *Jacobson*, at 6-7: "Neither plaintiffs nor the Ninth Circuit ever suggested bypassing the means for termination set forth in Title IV. [Footnote omitted.] Plaintiffs' request is precisely that Hughes be ordered to use those means."). Neither rationale would implicate any need to allocate pension surplus in a plan merger.

III. THERE IS NO COLLATERAL REASON TO REVIEW THE SECOND CIRCUIT'S DECISION IN THIS CASE.

This case presents a straightforward question of statutory interpretation and nothing more. The Second and Third Circuits are in full agreement, and four federal district courts have joined the chorus, including two lower court decisions in unrelated cases: *neither a merger of overfunded contributory defined benefit pension plans, nor any other transaction subject to ERISA Section 208 that involves such plans, triggers an allocation, to or for the benefit of plan participants, of surplus existing in a transitory sense at the time of the transaction, to the extent such surplus is attributable to participant contributions.*

The Ninth Circuit's decision in *Jacobson* is not to the contrary. In fact, Petitioners have cited no federal court decision, and Respondents are aware of none, that con-

flicts with *Malia* or *Brillinger*. Only Petitioners themselves seem to disagree with the Second Circuit's decision below.

Perhaps for this reason Petitioners ignore the fact that *all* accrued benefits were preserved in the RCA Plan-GE Plan merger, in accordance with Section 208, and they instead devote much of their Petition to hypothetical "horribles" that might someday occur if they are denied the windfall they seek.[15] Petitioners' concerns are far more fantasy than fact. As the district court noted in *Systems Council EM-3* with respect to a similar argument: "Rhetorical or emotional arguments voicing fears about the future . . . simply cannot substitute for rigorous analysis of the pertinent statutory provisions." *Systems Council EM-3*, 972 F. Supp. at 27. Neither those statutory provisions nor their legislative history support Petitioners' claim. In the end, the relief Petitioners seek must be obtained from Congress, not from the courts. As this Court has so frequently admonished, it is the role of Congress, not the judiciary, to reconsider its legislative compromises. *See, e.g., Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts

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[15] Respondents note that the hypothetical situations Petitioners describe have little or no basis in reality. Petitioners imagine, for example, that GE might have transferred pension assets and liabilities to Thomson Electronics ("Thomson"), but retained the full amount of any surplus existing in the RCA Plan at that time, when it sold assets of RCA's Consumer Electronics Division to Thomson. Petitioners posit that GE might then have terminated the RCA Plan and received any surplus attributable to contributions by participants for whom pension assets and liabilities were transferred to Thomson. (Pet. at 15-16). GE, of course, never took such action. Moreover, the merger of the RCA Plan with the GE Plan unequivocally precluded such a result. The GE Plan expressly prohibits any reversion of surplus assets to GE upon an actual plan termination. (*See* GE Pension Plan, Section II(1)-(2), attached as Exhibit "E" to each of the Memoranda of Law of Defendants in Support of Their Motion to Dismiss Plaintiffs' Complaints Pursuant to Fed. R. Civ. P. 12(b)(6), filed in *Warrick* and *Brillinger* below, Item 18, *Warrick* District Court docket entries, and Item 13, *Brillinger* District Court docket entries).

are not authorized to rewrite a statute because they might deem its effects susceptible to improvement.").

CONCLUSION

This case involves a single issue of statutory interpretation that has been resolved uniformly by two federal appellate courts and four federal district courts. No federal court has reached a contrary result. For these reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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